IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY APPLICATION No 51 of 2003

WITH

COMPANY APPLICATION No 52 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HAFEZ RUSTOM DALAL

Versus

REGISTRAR OF COMPANIES

Appearance:

1. COMPANY APPLICATIONS No. 51, 52 of 2003

MR SN SOPARKAR SENIOR ADVOCATE WITH
MR MANISH R BHATT for Applicants.
MR KAMAL B TRIVEDI, SENIOR COUNSEL WITH
MS PJ DAVAWALA WITH
MR JITENDRA MALKAN for Opponent.

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 30/12/2004

COMMON ORAL JUDGEMENT

The applicants in these two applications are the Ex-Directors/Directors of Bahuma Polytex Ltd., a Company incorporated under the Companies Act, 1956 and have taken out these two judges summons separately seeking declaration from this Court that the applicants have acted honestly and reasonably and having regard to all the circumstances of the case, the applicants ought to be excused and be relieved from the liability arising out of the notices dated 21.06.2002 issued by the Registrar of Companies, the opponent herein.

2. The applicants have filed affidavits in support of the respective Judges Summons taken out by them in these two applications. Heard Mr. S.N. Soparkar, learned Senior counsel appearing with learned advocate Mr. Manish R. Bhatt for the applicants, Mr. Kamal B. Trivedi, learned Additional Advocate General and Senior Counsel appearing initially with Ms. P.J. Davawala and thereafter Mr. J.M. Malkan, learned Standing Counsel appearing for the Opponent.

3. It is the case of the applicants that Bahuma Polytex Ltd. was incorporated and registered on 12.11.1986 as a Private Limited Company. Consequent to the change in the status as a public limited company, a fresh Certificate of Incorporation was granted by the Registrar of Companies, Gujarat on 23.11.1990. The Company had issued a prospectus dated 06.05.1992 for the public issue of 22 Lacs Equity Shares of Rs.10 each at par aggregating to Rs.220 Lacs. The applicants were invited to become Directors of the Company and signatory to the prospectus.

4. It is also the case of the applicants that the applicants have received notices dated 21.06.2002 issued by the opponent alleging that the Company had come out with the public issue of 22 Lacs Equity Shares of Rs.10 vide prospectus dated 08.05.1992 and that various statements / forecasts were made in the prospectus which have not been implemented. It is also alleged in the said notices that the said statements made in the prospectus were false, deceptive and misleading and, therefore, the said show-cause notices were issued calling upon the applicants and other Directors to explain within seven days as to why penal action under Sections 63, 68 and 628 of the Act should not be taken against them.

5. The applicants vide their letter dated 02.07.2002 gave a detailed reply to the said notices denying the allegations and explaining that the Company has fully implemented the project as mentioned in the prospectus. It was also stated that IFCI has issued a Project Completion Certificate and that the final disbursement of the loan was made only after the project was completed. Emphasising on the sales aspect, it was submitted by the Company that the Company has achieved what was projected in the prospectus and sometimes it even exceeded the projections so far as sales are concerned. It has also been recorded by the Company that after the project was completed, it was decided to convert one of the plants into a 100% Export Oriented Unit since the company was gearing itself to enter export market in a big way. It was also stated that all the export obligations of the EOU were completed as planned. It was, therefore, requested that the Registrar of Companies should not take any penal action under Sections 63, 68 and 628 of the Act.

6. Despite the aforesaid reply, the applicants were apprehending penal action to be taken against them and hence, they preferred Company Applications No. 170 of 2002 and 213 of 2002 before this Court under the Provisions of Section 633 (2) of the Act. The said two applications came to be disposed off by this Court vide order dated 26.12.2002 whereby the applicants were permitted to file additional submissions and the Registrar of Companies was directed to consider and pass an order on the same so as to take a view as to whether it was a fit case for justifying dropping of proposed prosecution proceedings. It was also stated in the said order that if the Registrar of Companies takes an adverse view, the prosecution shall not be launched for a period of fifteen days.

7. Pursuant to the aforesaid order of this Court, the applicants have filed their detailed submissions on 03.01.2003. The applicant of Company Application No. 51 of 2003 has reiterated his submissions made in his earlier letter dated 02.07.2002 stating that he had ceased to be a Director of the Company on and from 15.03.1997 as notified to the Registrar of Companies, by the Company's Form No. 32 dated 28.03.1997. It has been duly acknowledged in the opponent's office. It was also stated that during the period from 08.05.1992 to 15.03.1997, when the applicant was Director of the Company, the company had duly implemented the expansion cum diversification project under the direct control and supervision of the lead financial institutions, i.e.

IFCI, which had released the finances from time to time after duly verifying the relevant implementation of the project and had also issued the project certificate in favour of the company. The issuance of a project certificate by a Govt. Corporation i.e. IFCI would conclusively establish that the project has been duly implemented. By the time, the applicant had left the company in March, 1997, the company had been exceeding the estimated sales figures as were originally projected in its prospectus and that the company was also earning profits, that its networth was positive and that it had healthy reserves. It was also stated that the said applicant was an ordinary Director of the Company and had never been assigned any executive or managerial or other responsibility or that he had not participated in the management of the affairs of the Company and that the Company had Managing / whole time Directors during the period of his Directorship and, therefore, he had never been the officer in default within the meaning of Section 5 of Companies Act in the case of the Company. After his resignation from the Company, he did not have any knowledge or information about the Company's subsequent working and financial position. In the notice dated 21.06.2002, addressed by the Registrar of Companies, reference was made to the position stated in the Company's balance-sheet as on 30.06.2000. Since the said applicant has resigned as a Director from 15.03.1997, he was not in a position to offer any comments thereat.

8. Similarly, the applicant in Company Application No. 52 of 2003 have also filed his detailed reply on 03.01.2003. It was stated in the said reply that the applicant No.2 ceased to be a Director of the Company on and from 14.12.2000 as notified to the Registrar of Companies by the Company's Form No. 32 dated 14.12.2000. The company has also made detailed submissions under its letter dated 04.01.2003 to the Registrar of Companies.

9. Despite the aforesaid submissions made by the applicants, the Registrar of Companies has issued a communication dated 04.02.2003 stating that the explanation furnished by the applicants did not justify dropping of proposed prosecution proceedings. The present applications are, therefore, filed by the applicants by invoking the provisions of Section 633 (2) of the Act. The Court has issued notice on 14.02.2003 and granted ad-interim relief in terms of para B of the Judges Summons. The said ad-interim relief was continued from time to time till the applications are finally heard and disposed of.

10. Mr. S.N. Soparkar, learned Senior counsel appearing with Mr. Manish R. Bhatt for the applicants has submitted that the Registrar of Companies has not at all taken into consideration the various submissions made so as to satisfy him that this is not a fit case for initiating prosecution. The communication issued on 04.02.2003 was not even referring to the various factual and legal submissions made by the applicants. Despite the clear directions of this Court, the Registrar of Companies has not applied his mind and has issued a mechanical order deciding to proceed further for initiation of prosecution proceedings. The relevant statements as appearing in the Company's prospectus were made bonafide and were based upon the facts and circumstances then prevailing. The cost of project and means and finance as mentioned in the company's prospectus and as actually incurred has been given by him in the tabular form in the affidavit filed in support of the Judges Summons. The same is as under :-

	(Amount in Rs. in lacs) As per Prospectus	As actually incurred
Land and site development	10.50	8.89
Building	42.32	73.97
Plant and machinery and other Fixed asset.	402.20	388.66
Preliminary and pre-operative Expenses.	37.48	60.28
Contingencies	39.05 (adjusted in other head)	
Working capital margin	67.45	110.13
	600.00	641.93
MEANS OF FINANCIAL AND SHARE CAPITAL :-		
Promoters and Associates	150.00	150.00
Public	220.00	220.00
Internal accruals	---	8.93

TOTAL (A)	370.00	411.93
LOANS :-		
IFCI	130.00	130.00
ICICI	100.00	100.00
TOTAL (B)	230.00	230.00
TOTAL (A) (B)	600.00	641.93

11. Mr. Soparkar has further submitted that the Company had indeed achieved what has been projected in the Company's prospectus. In support of this submission, he has relied on the several letters and correspondence which are produced along with the affidavit filed in support of the Judges Summons. He has further submitted that the impugned notices dated 21.06.2002 as well as 04.02.2003 alleging breach of the statements made in the prospectus issued in the year 1992 are barred by delay and latches as it is not open to the Registrar of Companies to rake up the issue after a period of about more than ten years.

12. Mr. Soparkar has further submitted that the issuance of notices itself is bad and illegal as it is based on misapprehension and wrongly treating the Company as vanishing Company. He has further submitted that the criteria for identifying Vanishing Companies are that such company does not comply with the legal requirements for two years [Listing requirements include filing of annual returns and balance-sheets] with Stock Exchange / Registrar of Companies, and that it does not submit the required reports to Regional Stock Exchange, and that it does not correspond with Regional Stock Exchange for two years and that it is not available at its Regd. office at the time of Stock Exchange Inspection. In so far as the Company in question is concerned, it does not fall in any of these four criterias. The company has applied for listing requirement, and has been submitting required report to Regional Stock Exchange. No complaint has been made by the Regional Stock Exchange that it has not corresponded for two years or that the Company is not available at its Regd. office. Since none of the four criterias is applicable, the company cannot be considered to be a Vanishing Company. In the list of Vanishing companies issued by SEBI, the name of the Company in question does not figure. In the lists down loaded from the internet on 20.12.2003 and 07.08.2004 of vanishing Companies, the name of the Company does not appear. The impugned action taken against the Company and its

Directors or Promoters is obviously due to the mistaken identity. Mr. Soparkar, therefore, submitted that the impugned notices deserve to be discharged.

13. Mr. Kamal B. Trivedi, learned Senior advocate appearing with Ms. P.J. Davawala and Mr. Jitendra Malkan, the learned Standing Counsels appearing for the Opponent has submitted that it is incorrect to proceed on assumption that the actions were initiated against the Company and its Directors solely on the basis of treating the Company as Vanishing Company. It is a matter of fact that none of the notices issued on the applicants referred to the words "Vanishing Companies". If one refers to the heading "Plant & Machinery" on internal page 11 of the Prospectus, it was suggested that the Company under the proposed expansion cum diversification Scheme will have (i) Texturising Machine of 216 Spindles, (ii) 14 Nos. Con Winding Machine of 24 Spindles, (iii) one two-for-one (IFO) Twisting Machine of 320 Spindles, (iv) Dyeing Plant of 200 Kg. Par batch capacity with other accessories. It was also stated under the said heading that the Company had already placed order for Dyeing Plant which was expected to be delivered by the end of May, 1992 and that it has also negotiated orders for Con Winding Machine, delivery of which was already started by end of March, 1992 and would continue to June 1992 and that the order for Texturising and Twisting Machines would be placed in August and the same would be commissioned by September / October, 1992.

14. He has further submitted that as against the above statements made in the Prospectus, it is seen from the balance-sheets for the year 1991 - 92 and 1992 - 93 that though Texturising machine of 216 Spindles was mentioned, a Twisting Machine of 320 Spindles was not referred to at all, meaning thereby the said two balance-sheets as well as other subsequent balance-sheets did not indicate the factum of the Company having installed a Twisting machine of 320 Spindles as promised. Mr. Trivedi has further submitted that it was assured in the prospectus under the head "Project" at page 11 that on completion of the proposed Scheme, the installed capacity for manufacturing of texturising and twisted yarn would be increased from 576 M.T.s to 1860 M.T.s. The balance-sheet for the year 1991 - 92 did not show that the installed capacity was over 576 M.T.s. Similarly, subsequent balance-sheets also showed that the Company never reached the installed capacity to 1860 M.T.s as promised. As against the assurance given in the prospectus, it has been seen from the subsequent balance-sheets that the Twisting Machine was never

purchased as promised. It was assured in the Prospectus under the head Land and Building that the order for Texturising and Twisting Machine will be placed in August 1992 and will be commissioned by September / October, 1992. The Building at site was not completed by the date as promised in the Prospectus. It was assured in the Prospectus under the head "location" at page 11 that the proposed expansion scheme would be implemented at GIDC Industrial estate, Kadi, C category backward area which is 1.5 km. away from the existing plant of Krishnanagar, Kadi. The balance-sheet subsequent to the prospectus clearly indicated that the proposed expansion scheme was never fully implemented as promised.

15. From the perusal of the assurances given in the Prospectus as well as the balance-sheets, Mr. Trivedi has submitted that the signatories to the Prospectus have made false, deceptive and misleading statement. The applicants instead of explaining their conduct and acting honestly and reasonably for being excused, have contested the facts and merits of the offences committed by them and other co-promoters and directors. This is not an appropriate forum and they should under go the trial before the appropriate Court and the present applications under Section 633 (2) of the Act filed by the applicants are not sustainable at all in the eye of law. It would not be possible for the applicants to prove as to whether the charges sought to be levelled against them vide the impugned show-cause notices are incorrect, nor is it possible to arrive at a satisfactory conclusion with regard to the knowledge or complicity or honesty or reasonableness of the action of the applicants or with regard to the fairness of their claim to be excused for any lapse or offence. It is always open for them to establish their defence in case the prosecution is launched by the Registrar of Companies. He has, therefore, submitted that the communication dated 04.02.2003 issued by the Registrar of Companies is not one which is called mechanical or without any application of mind.

16. In support of his submission, Mr. Trivedi has relied on the decision of the Allahabad High Court in the case of G.D. BHARGAVA AND OTHERS V/S. REGISTRAR OF COMPANIES AND OTHERS, 40 COMPANY CASES 664 wherein it is held that the Trial Court, where charges of offences falling both within and outside the purview of Section 633 of the Act may have been joined, can take and examine detailed oral and documentary evidence so as to be able even to view them separately and to take appropriate action under Section 633 (1) with regard to some

allegations or some particular officer or officers but this Court cannot satisfactorily do so as it is not a Court of trial for an alleged offence or offences when acting under Section 633 (2) of the Act.

17. Mr. Trivedi has further relied on the decision of the Bombay High Court in the case of S. PANDIT, IN RE. (1990) 2 COMPANY LAW JOURNAL 170 wherein it is held that the issues raised by the petitioner under Section 633 (2) of the Act would be determined by the Court in which the proceedings may be instituted by the Registrar of Companies and before which Court, it is open for the Directors to establish that they had acted honestly and reasonably. He has, therefore, submitted that the present applications may be rejected in limine with liberty to the applicants to raise various contentions before the Trial Court and no relief can be granted in these applications. Mr. Trivedi has further relied on the decision of the Calcutta High Court in the case of IN RE, COAL MARKETING CO., INDIA PRIVATE LTD., AIR 1968 CALCUTTA 119 wherein, on facts it is held that the excuses put forward were frivolous and did not explain non-compliance with the statutory requirements. The power under S. 633 was a discretionary one and could be exercised only when the Court was satisfied that the defaulting directors had acted honestly and reasonably. The satisfaction of the Court was not a mere ritual and was not met by mechanical averments in the affidavit. The satisfaction ought to be reached after serious and careful considerations.

18. Mr. Soparkar, learned Senior counsel, in rejoinder on the basis of the further affidavits filed by the applicants, has submitted that additional twisting machines were not purchased by the Company only because the Company already had twisting machines in its possession, installed at the factory and at that point of time, twisted polyester filament yarn was becoming unpopular and out of vogue in the domestic market and it was not prevalent in the overseas market. Instead, there was demand for air inter mingled yarn for use in warp of fabrics. This air intermingled yarn totally replaced twisted yarn in this application and export market almost exclusively used Air intermingled yarn. He has, therefore, submitted that it was thought prudent to invest in Air inter mingling yarn equipment instead of additional Twisting machine. This provided the company with greater flexibility to produce both twisted yarn and Air inter mingled yarn as per demand. The investment was made in Air inter mingled yarn equipments and the same was installed. This decision in fact proved fruitful as

large quantity of inter mingled yarn was subsequently exported by the Company.

19. Mr. Soparkar has further drawn the attention of the Court to the Company's position of Profit after Tax (PAT) which is given in the further affidavit filed on 11.08.2004. The same is as under :-

PAT (Rupees in Lacs)

	1993		1994		1995	
	Projected	Actual	Projected	Actual	Proj.	Actual
Sales	1671	925	2910	1515	2910	1957
PAT	33	12.41	50	40.20	41	97.03

He has submitted that in the year 1993, the project was not fully implemented as the disbursement of loan from IFCI was delayed. In 1994, (i.e. first full working year) profit achieved was 90% of the projected profit and in the year 1995, the PAT achieved was 2.37 time the projected profit. This was inspite of the fact that the turnover figures were lower due to reduction in excise duties on polyester. The export turnover was net of excise duty and customs duty. Inspite of turnover falling, percentage of PAT actually increased beyond projections. He has further submitted that the turnovers assumed in projections were inclusive of duties and actuals have much lesser duties for domestic and zero duties for exports.

20. Mr. Soparkar has also clarified certain issues raised during the course of hearing on 07.10.2004, by filing further affidavit-in-rejoinder on 14.10.2004. He has submitted that the summary of machinery acquired during the years 1991 - 92, 1992 - 93 and 1993 - 94 as assured in the Prospectus, is as under :-

Sr. No.	Particulars	1991-92	1992-93	1993-94	1996-97
1.	Texturising Machinery	----	153.57*	----	-----

2. Cone Winding
Machinery 5.75 27.26 36.84 -----

3. TFO Twisting
Machinery ---- ---- ---- -----

4. Dyeing
Machinery 40.23 ---- ---- ----

5. Other fixed
assets including land,
building, machineries,
other than mentioned in
1 to 4 above like Boiler,
Air-conditioning,
Electrification, DG Sets,
Air Compressor etc. 74.23 55.78 77.42 -----

6. Public issue
Exps. ---- 60.28 ----- -----

Total 120.21 297.39 114.26 7.10

Sources of Funds

Promoters
Contribution 135.00 ---- ----

Public Issue ----- 268.00 -----

Term Loans ----- 190.00 40.00

Total 135.00 458.00 40.00

As submitted in the above statement, though the Dyeing Machine was acquired in 1991-92, the payment thereof was made in 1992-93. The Texturising Machine includes intermingled air jets used to manufacture intermingled yarn. The investment in Working Capital was not included in the above statement.

21. While dealing with the specific allegations of non-installation of dyeing plant, Mr. Soparkar has submitted that Dyeing Plant having capacity bigger than 200 kg / batch was installed and subsequently in 96-97 another dyeing plant of 100 kg capacity / batch was installed. The Plants are present and available at the site. Subsequent records related to excise and exports clearly demonstrate that dyed yarn in large quantities

was not only exported to various countries but also sold extensively in the domestic market. With regard to the allegation of non-installation of Texturising Machine and TFO Twisting machine, Mr. Soparkar has submitted that Texturising machine with 216 Spindles was installed at 20 KEJF GIDC, Kadi. Air Jet Intermingling attachment were part of texturising machine which were installed on this machine as a substitute to twisting as the company already had twisting capacity. The Twisting Machinery worth Rs. 16.08 Lac was already available since 1988 1989. This enabled the Company to add to its product mix and offer both twisted and intermingled yarn, which are substitutes of each other, as warp yarns. This is borne out by the fact that large quantities of intermingled yarn both dyed and undyed were exported and dyed twisted yarns were sold in the domestic market and also exported to Turkey and Italy. All necessary machinery and plants were installed and run successfully.

22. While dealing with this further affidavit as well as the submissions made by Mr. Soparkar, further reply affidavit was filed on behalf of the Registrar of Companies on 30.11.2004 wherein it is interalia stated that the applicants have miserably failed to give satisfactory and cogent evidence to prove their actions as per the Prospectus in respect of the machineries mentioned therein. It has been summarised that :-

(i) Twisting Machine and Dyeing Plant in question were never purchased and installed during the period in question,

(ii) Core Winding Machines and Dyeing Plant were not commissioned in June 1992 and May 1992, respectively,

(iii) There is no mention of Air Jet Intermingling Attachment as a substitute for Twisting Machine in any of the balance sheet of the Company.

(iv) Installed capacity did not increase from 576 MTs to 1860 MTs during the period in question, for the manufacture of Texturised and Twisted Yarn, based on an average denier of 132.

(v) There was never a full-fledged implementation of the prospectus as promised.

(vi) Only an amount of Rs. 180.83 lacs appeared to have been spent by the company towards plant and machinery. As against this, the company had

shown the project cost of Rs.303.81 lakhs in the prospectus for raising money. This was so despite the fact that the company had got Rs.230.00 lacs by way of financial assistance from the institutions, which perhaps could have taken care of the requirement of the company at the material time without raising money from the public.

23. Based on the above summary, it has been submitted by Mr. Trivedi that the present applications filed by the applicants are thoroughly misconceived, untenable and unsustainable in the eye of law and more particularly, when the applicants have failed to discharge the onus of proving their bonafide to discharge their liability qua the misstatements made in the said Prospectus despite numerous opportunities provided to them, as also looking to the conduct of the applicants, they are not entitled to any relief as prayed for or otherwise.

24. The above summary made by the Registrar of Companies in the aforesaid affidavit was further replied to by filing further affidavit on 14.12.2004. The point wise reply was given to the above six items stated in the said affidavit. With regard to item No.1, it was stated that Dyeing Machine was purchased and installed and dyed yarn was produced. This is a matter of public record as exports of dyed yarn were made under excise control. The relevant excise records, advance license, export documentation bear out testimony to this fact. With regard to item No.2, it was stated that the Cone Winding Machines have been installed and dyed yarn, which has to be necessarily wound on the same has been produced and exported. With regard to item No.3, it was stated that the Air jet intermingling attachment has been installed and production / excise and records of Development Commissioner (EOU) Kandla and export documentation of Air intermingled yarn are sufficient evidence on this aspect. With regard to item No.4, it was stated that Texturising machine of 216 Spindles has been installed and in addition, excise records pertaining to production is available at site. The same site was also an export oriented unit registered with Development Commissioner, Kandla. EOU status was granted to the unit only after due diligence and verification by the government authorities. With regard to item No.5, it was stated that financial institutions disbursed loans and issued Project Completion Certificate only after detailed and periodic inspection of the projects financed by them. Project Completion Certificate was granted by IFCI after due diligence. With regard to item No.6, it was stated

that the opponent has not even cared to look at the relevant clauses of the prospectus. There is no substance in saying that in view of the financial assistance from the institutions, there is no need by the Company to raise money from the public.

25. Based on the aforesaid clarifications made in the affidavit filed on 14.12.2004, Mr. Soparkar has submitted that there is no substance in any of the allegations made by the Registrar of Companies and hence the proposed action of initiating and/or launching criminal prosecution against the applicants is unsustainable and impugned notices deserve to be quashed. In support of his submissions, Mr. Soparkar has relied on the decision of the Madras High Court in the case of M. MEYYAPPAN V/S. REGISTRAR OF COMPANIES, 112 COMPANY CASES 450 wherein it is held that under Section 633 (2) if any notice is received for negligence, breach of duty, miscompliance or breach of trust and any application is made before the High Court, the Court has the same power to decide as if it had been a court before which a proceeding against the officer for negligence, default, breach of duty and breach of compliance has been brought under sub-section (1). The petition is, therefore, maintainable. It is further held that since the petitioner had acted honestly and diligently and properly explained the delay of 24 days in submitting the cost report to the Company Law Board, the Registrar of Companies was to forbear from prosecuting the petitioner for the offence mentioned in the show cause notice. Mr. Soparkar has further relied on the decision of the Andhra Pradesh High Court in the case of R.K. MAHAPATRA AND OTHERS V/S. SECRETARY TO GOVERNMENT AND ANOTHER, 92 COMPANY CASES 809 wherein, while allowing the petition on the ground that the complaints were barred by limitation in respect of Sections 49(1)(a), 292, 292(1)(d) and 292(3) of the Companies Act, 1956 the Court has further held that the question whether the deployment of funds was in the nature of short-term deposit or investment in the nature of portfolio management scheme was debatable. There was no reason why the averments in the petition that the petitioners had acted honestly and reasonably and in good faith in treating the deployment of funds as short-term deposits should not be accepted, especially, when the Company was not put to any loss nor had the petitioners gained any personal advantage as a result of these transactions. In view of the circumstances, the petitioners had acted honestly, reasonably and in good faith and were entitled to be relieved of the liability for the offence under Section 211 of the Act.

26. After having heard learned advocates appearing for the respective parties and after considering their pleadings as contained in several affidavits filed during the course of hearing of these two applications and after examining the relevant provisions of the Companies Act, 1956 as well as the authorities cited before the Court, the Court is of the view that both these applications deserve to be allowed and they are accordingly allowed for the reasons stated hereinunder.

27. It is pertinent to note here that while disposing of the earlier Company Applications No. 170 of 2002 and 213 of 2002 vide order dated 26.12.2002, this Court has specifically directed the opponent to consider the reply filed by the applicants and/or additional reply or submissions which were to be made by the applicants, within one week from the date of the order and thereafter take appropriate decision in the matter. The Court has further directed that the explanation which was already given and the explanation which was to be given thereafter within the aforesaid period would be considered on merits and appropriate decision would be taken within a period of one month thereafter. It appears from the communication dated 04.02.2003 sent by the opponent to the Company and copy thereof endorsed to the applicants of both these applications that he has not considered at all the letters written by the applicants on 03.01.2003. The opponent has only dealt with the submissions made by the Company vide its letter dated 04.01.2003. The submissions made by the applicants have not been dealt with and even Company's submissions were not dealt with in detail. It was merely observed therein that explanation furnished by them and the submissions made by their letters under reference and their previous letters dated 01.07.2002 did not explain satisfactorily the reasons for non-fulfilment of commitments and promises made in the Prospectus dated 08.05.1992 timely and completely, on the basis of which the public in general was induced to invest money in the Company. It was further stated that the claims made by the Company in its letter under reference that issue proceeds have been deployed for the project as stated in the Prospectus were incorrect and false in material particulars since they were not supported by the Balance sheets subsequent to the public issue. On the basis of these averments, the opponent has come to the conclusion that there was default and/or breach of duty and/or breach of trust on the part of signatories to the Prospectus and he has, therefore, believed that untrue statements were made in the Prospectus knowingly it, to be false, deceptive or misleading with an intent to induce or attempt to induce

person to invest money in the Company. The opponent has not dealt with any of the submissions raised by the applicants, in their true perspectives and in the most laconic manner, the said submissions were either discarded or ignored completely. The glaring example of this non-application of mind can be found from the fact that despite specific plea raised by the applicant in Company Application No. 51 of 2003 and the applicant No.2 in Company Application No. 52 of 2003 that they ceased to be the Directors of the Company and that they did not have any say in the affairs of the Company, the said plea was not dealt with. Mr. Trivedi was fair enough in stating that the authority will not have any case against the applicant in Company Application No. 51 of 2003. When the said action was challenged by the applicants in the present proceedings, the opponent has gone on filing affidavits after affidavits to justify his decision. The Court is, therefore, of the view that despite a specific direction being given by this Court, the matters were not dealt with by the opponent in the manner in which they ought to have been dealt with.

28. The action of the opponent is not sustainable even on the ground that the Company in question is not a vanishing company and still the notices were issued on the applicants on assumption that the Company is a vanishing company. The Company does not fall in any of the criterias which are laid down for treating the Company as a vanishing company. The applicants have demonstrated before this Court in their pleadings that the applicants' name was not included in the list of Vanishing companies and there was no allegation against the Company that it did not comply with the listing requirement for two years or that it did not submit the required report to Regional Stock Exchange or that it did not correspond with Regional Stock Exchanges for two years or that it was not available at its Regd. office at the time of Stock Exchange Inspection. Since the Company is not a Vanishing Company and yet the action was sought to be taken against the Directors and/or Promoters of the Company on that basis, the said action is not justifiable on that count.

29. The action is unsustainable also on the ground of delay and latches as admittedly, the Prospectus was issued by the Company way back on 08.05.1992 and the notice under reference was issued by the opponent on 01.06.2002 i.e. after more than ten years. Even if one takes the view that law of limitation is not applicable to the proposed action, the same is clearly barred by delay and latches and the Court is certainly reluctant to

take cognizance of alleged defaults after the expiry of period of more than ten years.

30. Even on merits, the action sought to be initiated by the opponent is not sustainable. The alleged notice refers to three Sections, namely, 63, 68 and 628 of the Companies Act for initiating penal action against the applicants. Section 63 deals with criminal liability for misstatement in prospectus. It states that Where a prospectus issued after the commencement of this Act includes any untrue statement, every person who authorised the issue of the prospectus shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to Rs. 50,000/-, or with both, unless he proves either that the statement was immaterial or that he had reasonable ground to believe, and did, up to the time of the issue of the prospectus believe, that the statement was true. Section 68 deals with Penalty for fraudulently inducing persons to invest money. It states that any person who, either by knowingly or recklessly making any statement, promise or forecast which is false, deceptive or misleading, or by any dishonest concealment of material facts, induces or attempts to induce another person to enter into, or to offer to enter into - (a) any agreement for, or with a view to, acquiring, disposing of, subscribing for, or underwriting shares or debentures; or (b) any agreement, the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of shares or debentures, or by reference to fluctuations in the value of shares or debentures; shall be punishable with imprisonment for a term which may extend to five years, or with fine which may extend to Rs. 1 Lacs, or with both. Section 628 deals with Penalty for false statements. It states that if any return, report, certificate, balance-sheet, prospectus, statement or other document required by or for the purpose of any of the provisions of this Act, any person makes a statement (a) which is false in any material particular, knowing it to be false; or (b) which omits any material fact, knowing it to be material, he shall save as otherwise expressly provided in this Act, be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine.

31. If the opponent is of the view that the Directors and/or Promoters of the Company have committed breach of the provisions contained in Sections 63, 68 & 628 of the Act, he should not have waited for long ten years. Such commission or omission on their part would have come to the forefront immediately. The action taken after ten

years itself suggests that it was based on the instruction issued by the Director of Inspection and Investigation to initiate actions against the Vanishing Companies. While issuing notices, the respondent authority has not pointed out any specific instances stating that which false or deliberate statements were made in the Prospectus or that such statements were made to induce the public for subscribing the shares of the Company. If any action is sought to be taken without any basis, the Court has every power to entertain an application under Section 633 (2) of the Act. It says that Where any such officer has reason to apprehend that any proceeding will or might be brought against him in respect of any negligence, default, breach of duty, misfeasance or breach of trust, he may apply to the High Court for relief and the High Court on such application shall have the same power to relieve him as it would have had if it had been a Court before which a proceeding against that officer for negligence, default, breach of duty, misfeasance or breach of trust had been brought under Sub-section (1).

32. Looking to the submissions and explanations tendered, it can hardly be said that the applicants are liable for making any false or deliberate misstatements in the Prospectus. Sanctioning of loan by the Financial institutions, granting licenses by the respective authorities, furnishing returns and statements before the statutory authorities under the excise and other laws are sufficient to reveal that the Company has made all attempts to adhere to the assurances and promises given in the Prospectus. If something is lacking somewhere, no motive can be attributed to that, only with a view to bring the case within the purview of Sections 63, 68 or 628 of the Act. Even the case of the opponent is also to the effect that there was no satisfactory explanation for non-fulfilment of commitments and promises made in the Prospectus dated 08.05.1992 timely and completely. This timely and completely non-fulfilment of assurances and promises would not entitle the opponent to initiate the action under Sections 63, 68 & 628 of the Act. A reference is made to the decision of Andhra Pradesh High Court in the case of PROGRESSIVE ALUMINIUM LTD. AND OTHERS V/s. REGISTRAR OF COMPANIES AND ANOTHER, 89 COMPANY CASES 147 wherein the Court has taken the view that the omission in question could not be treated as a deliberate omission with a malafide intention of suppressing any truth from the public and that the explanation tendered by the petitioners for the delay in commercial production was reasonable. Subsequent developments and the progress made by the Company in the

direction of fructifying the objects for which the Company was incorporated, discharged or acquitted the promoters of any allegation that the misstatements in the prospectus were made with any dishonest intention of practising fraud upon the subscribers of the company.

33. Having regard to the facts and circumstances of the case and taking overall view of the matter, the Court is satisfied that the applicants have acted bonafide and there was no deliberate intention on their part to defraud the public and that there was no false or deliberate statement in the prospectus. The applicants, therefore, deserve the relief as prayed for in these applications. The applications are, therefore, allowed. The impugned notices are quashed and set aside. There shall be no order as to costs.

[K.A. PUJ, J.]

#Savariya#

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